

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
80761-s40A BY REUBEN C. PITSCH) FINAL ORDER

* * * * *

The Proposal for Decision (Proposal) in this matter was entered July 15, 1993. The Proposal recommended denial of a Beneficial Water Use Permit for Application 80761-s40A by Reuben C. Pitsch. The application requested appropriation of 1200 gpm up to 159.09 AF of water per year from Big Coulee Creek by means of a pump in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 5 North, Range 19 East, Golden Valley County, Montana. The appropriation would have been used for sprinkler irrigation on 324.20 acres, specifically described as: 38 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$, 118 acres in the SW $\frac{1}{4}$, 65 acres in the SE $\frac{1}{4}$, and 87.5 acres in the NE $\frac{1}{4}$ of Section 35; and 15.7 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ W $\frac{1}{2}$ of Section 36. The period of both appropriation and use would have been June 1 through June 30 of each year. Applicant filed timely exceptions to the Proposal but did not request oral argument. Objectors Harry and Diana Van Der Voort, Roy W. Olson, and Dan J. Olson filed a timely response to Applicant's exceptions.

Applicant specifically excepts to Conclusion of Law 9 where the Hearing Examiner found that Applicant failed to establish there are available unappropriated waters in Big Coulee during the month of June. Applicant argues that he is required to establish by a preponderance of the evidence water is reasonably

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available during the period its use is sought and that proof of absolute water availability throughout the period of use is not required. Further, Applicant argues, given the highly variable nature of Big Coulee Creek's flow, any requirement that constant availability be proved is totally unreasonable. Applicant contends he produced precisely the type of hydrologic evidence the statute requires to meet the standard of proof in the form of various hydrologic studies of Big Coulee Creek and the general Musselshell River drainage. According to Applicant, the Hearing Examiner should not have weighed this evidence against the statements of people in the area that there is not enough water for Applicant to irrigate, contending these statements are not very credible in view of the long-standing animosity of these people toward Applicant. Furthermore, Applicant argues, there has been a decrease in the number and extent of appropriations from Big Coulee Creek such as the revocation of several permits by the Department and the ruling by the Water Court that claimed water rights for approximately 1,000 acres had been abandoned. Applicant maintains this leaves more water in the creek and that it is more likely there is unappropriated water now available than there is not. Applicant claims that compared to his existing permit for April and May issued in 1987, there is more water available in the creek in June, according to the hydrologic reports, and fewer prior appropriations, courtesy of the Water Court and termination of senior permits by the Department.

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Therefore, Applicant maintains he has satisfied the standard of proof.

It is true Applicant submitted hydrologic reports prepared by the Department; however as Objectors pointed out in their response to Applicant's exceptions, this information relied on data that was taken at the Lavina, Montana, gauge station from August 1957 through June 1972. The data was extended by computer projection to include numerous more years. Applicant's Exhibit 2 contains a disclaimer that the information in the report does not directly address the water available in Big Coulee Creek which may be more critical than the situation along the river. In that same exhibit, on page 5 of the Musselshell Hydrologic Model Results for Basin Closure by Larry Cawlfeld, there is the following cautionary statement.

"It is important to keep in mind that the model is based on a monthly time period and model results should be viewed as such. It is possible that the model may not accurately represent the occurrence of shortages or surpluses within months when hydrologic conditions change significantly during a month. This might happen, for example, during June when snowmelt runoff and resulting flow in the river are diminishing rapidly. The model could predict an overall surplus for the month of June when, in actuality, a surplus may have occurred in the first part of the month followed by a shortage."

The Hearing Examiner noted in Finding of Fact 15 that although the sixty percent figure quoted in the report had been revised in 1992 to eighty percent, the report does not address the water available in Big Coulee Creek which may be more critical than the situation on the Musselshell River. The Hearing Examiner found that,

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"Given this ambiguity in the model, its focus on the mainstem of the Musselshell River, and the distances between the data points and the proposed point of diversion, the reliability and relevancy of the model results as an indication unappropriated water is available at Applicant's proposed point of diversion during June is limited or "slim".

Applicant's Exhibit 1 contains a stream flow analysis performed by Sterling Sundheim. This analysis reflects conditions at a USGS gauging station many miles downstream from Applicant's point of diversion. The values in the analysis are averages for the entire month, not specific to any part of the month, and do not indicate how many days in the month the projected flow levels may occur.

Not one of the hydrologic studies introduced as evidence by Applicant pertain to the flow of Big Coulee Creek at his point of diversion. Moreover, none of Applicant's exhibits pertain to the amount of water available at Applicant's point of diversion during the proposed period of use as required by Mont. Code Ann. § 85-2-311(1)(a) (1993).

It is well-settled law that the testimony of laymen who have "wide and long experience" in the area can be given more weight than the testimony of experts. Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Joerger v. Pacific Gas & Elec. Co., 207 Cal. App. 171, 292 P. 549; See also Stinson Canal & Irr. Co. v. Lemoore Canal & Irr. Co., 45 Cal. App. 241, 188 P. 77. This is especially pertinent in this case where the experts' reports, studies, etc. do not address the conditions at Applicant's point of diversion. Applicant could have measured the flow of Big

Coulee Creek at his point of diversion during the month of June from the time of the final decision In re 53547-40A by Pitsch (1987), and submitted those measurements which would have been given more weight than either the testimony of the downstream users or the experts. Apparently he chose not to, relying instead on reports and studies which have slim relevance and other persons to present the necessary testimony. He now complains that the downstream users have a long-standing animosity toward him and their testimony should be disregarded. The record contains no evidence establishing the alleged animosity. Furthermore, this reviewer has listened to the tapes of the hearing and discerned no animosity in either voice inflection or testimony.

Simply because permits were revoked by the Department and the Water Court ruled that the water rights to irrigate about 1,000 acres was abandoned does not mean there is more water in the source. The water rights that were revoked were never used so the amount of water in the stream was not changed by that action. The Water Court ruled the water right for the 1,000 acres had not been used for a period long enough to constitute abandonment meaning the water had not been taken out of the stream for years. Technically there is no more water in the stream than there was before these water rights were revoked or declared abandoned.

The Hearing Examiner did not find there were insufficient waters in Big Coulee Creek, he found the evidence provided by

Applicant was not substantial enough to overcome the collective and uncontradicted testimony of Objectors and that it could not be concluded solely on the basis of the results of the hydrologic models that unappropriated water is available at the proposed point of diversion in the amount Applicant is requesting throughout the proposed period of diversion. The Hearing Examiner found there may or may not be water available in Big Coulee Creek in June during a certain identifiable period, and it may occur with sufficient frequency to allow an additional appropriation; however the evidence presented lacks enough substance and precision to conclude there is a preponderance supporting a conclusion in either direction, that water is or is not available in Big Coulee Creek during June at the proposed point of diversion. This reviewer, after reviewing the record, cannot find that the Hearing Examiner could have found otherwise.

Having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the July 15, 1993, Proposal for Decision and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

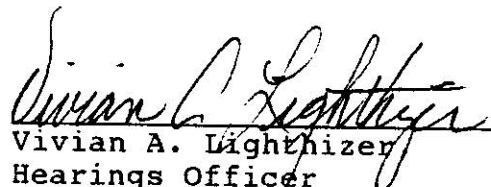
Application for Beneficial Water Use Permit 80761-s40A by Reuben C. Pitsch is denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 8th day of September, 1993.


Vivian A. Lighthizer
Hearings Officer
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 8th day of September, 1993, as follows:

Reuben C. Pitsch
1405 Custer Gulch
Ryegate, MT 59074

Town of Melstone
% Cindy McCaffree
P.O. Box 237
Melstone, MT 59054

Douglas H. Parrott
P.O. Box 266
Roundup, MT 59072

Roy W. & Dan J. Olson
Lavina, MT 59046

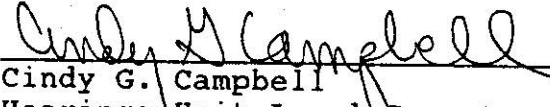
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Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
80761-s40A BY REUBEN C. PITSCH)

PROPOSAL
FOR
DECISION

* * * * *

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309 (1991), a hearing was held in the above matter on April 8, 1993, in Ryegate, Montana, to determine whether a Permit to Appropriate Water based on the above application should be granted to Reuben C. Pitsch under the criteria in Mont. Code Ann. § 85-2-311(1) and (5).¹

APPEARANCES

Applicant Reuben C. Pitsch appeared at the hearing on his own behalf.

Objectors Harry and Diana Van Der Voort appeared at the hearing personally and through counsel, John R. Christensen.

Objectors Roy W. and Dan J. Olson appeared at the hearing personally and through counsel, John R. Christensen.

¹ The 1993 Legislature amended Mont. Code Ann. § 85-2-311 to revise and clarify the burdens and standards of proof and expand the criteria under which applications for beneficial water use permits are processed. The amending acts, Senate Bills 231 and 280, were published as 1993 Montana Session Laws, Chapter 370 and 460, respectively. Depending on which act contains the pertinent amendment, the amendments apply retroactively to all applications pending on April 16 or 21, 1993, the effective dates of the respective acts. The above-entitled application was pending on April 16 and 21, 1993; therefore, the amendments apply to this application, and all references to Mont. Code Ann. § 85-2-311 are to the section as amended in 1993 Mont. Laws 370 and 460.

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Objector Douglas H. Parrott appeared at the hearing on his own behalf.

Objector Town of Melstone appeared at the hearing through its spokesperson, Cindy McCaffree.

Sterling Sundheim, Civil Engineering Specialist in the Lewistown Water Resources Division Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing as spokesperson for the Department.

EXHIBITS

Applicant offered the following exhibits for acceptance into the record. All of Applicant's exhibits were accepted into the record without objection except for Exhibit 5, the photographs, which were admitted as indicated below.

Applicant's Exhibit 1 consists of twenty pages. The exhibit is a collection of photocopies of materials from the record of In re Application 61333-s40A by Reuben C. Pitsch. The materials are June and July 1990 memorandums from Sterling Sundheim, Department Engineer, and a January 1990 report by Mark Reller, Department Hydrologist, all analyzing Big Coulee Creek water flow information. Also part of this exhibit are documents issued by the hearing examiner in that case notifying parties of entry of the materials into that case record.

Applicant's Exhibit 2 consists of ten pages. The first page is a photocopy of a September 27, 1990, Memorandum by Sterling Sundheim on "Application for Beneficial Water Use Permit No. 61333-s40A by Reuben Pitsch and the recent Musselshell Hydrologic

Model results completed for the basin closure petition." The remaining nine pages are an August 15, 1990, report from Larry Cawlfeld, Hydrologist with the Department's Water Management Bureau to various Department staff members on the "Musselshell Hydrologic Model Results for Basin Closure."

Applicant's Exhibit 3 is a photocopy of a thirty-five page report entitled *Water Availability Analysis on the Musselshell River below Ryegate, Montana* by Sterling Sundheim, Department Engineer, dated January 1982.

Applicant's Exhibit 4 is a one-page photocopy of Permit to Appropriate Water 53547-s40A issued April 10, 1987, to Reuben C. Pitsch.

Applicant's Exhibit 5 consists of eight color photographs. The photographs are of Big Coulee Creek, purportedly in the vicinity of the proposed point of diversion and downstream as much as four miles below the proposed point of diversion. Six of the photographs have the date May 16, 1991, written on the back. One photograph has the date "10-89" written on the back. The eighth photograph has the date March 8, 1979, and the words "Big Coulee water over road. Bridge gone." written on the front in the lower margin. Objectors Van Der Voort and Olson objected to the admission of Applicant's Exhibit 5 as irrelevant because the photographs were not taken during the proposed period of use. Applicant explained they were offered to show the flushing action which takes place in Big Coulee Creek, not as evidence of water

availability in June. Applicant's Exhibit 5 was accepted into the record for the purpose indicated by Applicant.

Objector Douglas H. Parrott offered the following exhibit for acceptance into the record, which was accepted into the record without objection.

Parrott's Exhibit 1 consists of fourteen pages. The first seven pages is the text of a report entitled *Water Availability Analysis For Proposed Musselshell Tributary Storage Sites*, for the Department of Natural Resources and Conservation Water Management Bureau, Water Resources Division, by Mark D. Reller, Hydrologist Water Resources Division, dated January 1990. The second seven pages are selected tables and figures from the report. Certain portions of the report and attachments had been highlighted prior to the exhibit being offered.

Objectors Van Der Voort offered the following exhibit for acceptance into the record, which was accepted into the record without objection.

Van Der Voorts' Exhibit 1 is a map of the pertinent reach of Big Coulee Creek. It is made of enlarged color photocopies of five Water Resources Survey maps which have been taped in alignment onto a 44-inch by 21-inch piece of paper. Certain features have been highlighted, such as relevant points of diversion. The approximate location of the former U.S.G.S. gauging station has been marked with an "X" of red ink.

Immediately prior to the hearing the parties were given the opportunity to review the Department's file on this application.

No objection was expressed against any part of the file being made a part of the record. At the beginning of the hearing, the Hearing Examiner entered the Department's file into the record in its entirety.

In the course of reaching a decision in this matter, the Hearing Examiner took official notice of records maintained by the Department on water rights in the vicinity of the proposed appropriation; took official notice of the Department publication, *River Mile Index of the Missouri River*, January 1979, introductory page and pages 40, 42, and 43; and took official notice of the January 1992 report *Water Availability in the Musselshell River Basin*, by Larry Cawlfeld, P.E., Montana Department of Natural Resources and Conservation. Furthermore, in the course of ruling on Objectors Van Der Voorts' and Olsons' Motion to Dismiss, the Hearing Examiner took official notice of the Department's file on In re Application 53547-s40A by Reuben C. Pitsch; specifically, the materials relating to water availability during June of each year.

Facts in this Proposal for Decision which have been derived from the noticed materials or records are identified as such.

PRELIMINARY MATTERS

At the beginning of the hearing, Objectors Van der Voort and Olson moved to dismiss this application on the basis of *res judicata*. They contend the record shows the matter was fully litigated once before to a Department Final Order which was not appealed, i.e., In the Matter of Application for Beneficial Water

Use Permit 53547-s40A by Reuben C. Pitsch, Final Order, April 6, 1987.

In Application 53547-s40A Reuben C. Pitsch, the same Applicant then and now, applied for 1,200 gallons per minute (gpm) of the waters of Big Coulee Creek for appropriation throughout the period from April 1 through October 1 of each year for irrigation of 324.2 acres of land by means of a pump and sprinkler irrigation system which were already in place. The point of diversion on Big Coulee Creek was in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 5 North, Range 19 East, Golden Valley County, Montana. The place of use was 38 acres in the NW $\frac{1}{4}$, 118 acres in the SW $\frac{1}{4}$, 65 acres in the SE $\frac{1}{4}$ and 87.5 acres in the NE $\frac{1}{4}$ of Section 35, and 9.2 acres in the NW $\frac{1}{4}$ and 6.5 acres in the SW $\frac{1}{4}$ of Section 36.² Beneficial Water Use Permit 53547-s40A was granted to Applicant in all particulars except the period of appropriation was and is limited to April 1 through May 31 of each year. In all particulars the two applications, 53547-s40A and 80761-s40A, are identical, except the period of appropriation of the latter is within rather than coextensive with that of the former. Furthermore, the objectors in the present contested case were all parties in the former case.

In order for *res judicata* to operate as a bar and prevent a relitigation of the same cause of action:

² The acreage in Section 36 can be more precisely described as 15.7 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ W $\frac{1}{2}$, which is the legal description used in the present application, 80761-s40A.

- 1) the parties or their privies must be the same;
- 2) the subject matter of the actions must be the same;
- 3) the issues must be the same and relate to the same subject matter; and
- 4) the capacities of the persons must be the same in reference to the subject matter and to the issues between them.

However, in order for the criteria to apply, there must be a final judgement on the merits by a court of competent jurisdiction. A final judgement on the merits is a finality as to the claim or demand in controversy not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. State Medical v. American Medical, 49 St. Rep. 1126, 1127 (Mont. 1992).

The Department has a series of prior decisions addressing the applicability of *res judicata*, a common law doctrine, in the administrative decision-making process it conducts under the Montana Water Use Act. *Res judicata* is a judicial doctrine, and a party to an administrative proceeding is not entitled as of right to its protection. However, the equitable concerns which underlie the doctrine may dictate the branch of *res judicata* known as collateral estoppel be applied. In re Applications G05081 and G05083 by Neil W. Moldenhauer (1984). Collateral estoppel applies where a prospective appropriator is attempting to relieve himself or herself of conditions placed on prior permits by abandoning the prior permits and attempting to subject the objectors to the prior permits to new proceedings. In re Application 34204-s42M by Donald H. Chaffee (1984). But, prior

decisions of the Department relating to the existence of unappropriated water in the source are *prima facie* proof regarding the existence thereof, and collateral estoppel does not apply because prior findings are subject to challenge. In re Application 50642-s40A by Zinne Brothers (1985); In re Applications 27941-s40A and 50642-s40A by Zinne Brothers (1988); In re Application 80175-s76H by Steve Tintzman (1993). Furthermore, if an application is denied, nothing in the Water Use Act precludes submission of a new application for the same appropriation as long as it is *bona fide*, is correct and complete, and if the elements of the application or other circumstances framing the issues in the matter are different. In re Application 72662-s76G by John A. Fee and Don Carlson (1990).

In all the prior contested-cases before the Department, only one application was dismissed where the stated reasons related to the doctrine of collateral estoppel, i.e., In re Application 34204-s42M by Donald H. Chaffee. But the issue in that case relates more properly to the statutorily defined test for whether the Department should take any action on an application: applicant must have a *bona fide* intent to appropriate water. Mont. Code Ann. § 85-2-310(3) (1991). In Chaffee, the second application did not represent a *bona fide* intent to appropriate water. It was an attempt to modify an existing permit. See e.g. In re Application 68033-s76G by Robert Hollenback (1992). The Water Use Act has provisions for the modification of an existing permit. See Mont. Code Ann. §§ 85-2-310, 314, and 402 (1991);

see generally Mont. Code Ann. § 85-2-312(1) (1991). It is difficult to rely on Chaffee to substantiate the applicability of *res judicata* to these administrative proceedings on water use permitting, especially in light of the more recent Department cases mentioned above which relate authority to the Water Use Act and not common law doctrines. See also In re Application G45422-76M by Paul A. and Natalie L. Hanson, dba Hanson Ranch (1990).

The principle in collateral estoppel is intended to give needed protection to litigants by ensuring the finality of the resolution of a controversy. The contested-case hearing and decision within the administrative permitting procedure of the Water Use Act is not a resolution of a controversy between litigants over a claim or demand. Roughly speaking, it is a process for determining whether a person can receive an entitlement. Compare Nasi v. State Dept. of Highways, 231 Mont. 395 (1998) (Findings of Board of Personnel Appeals are *res judicata* in wrongful discharge action). The Act allows any person to apply for a permit to appropriate water for a beneficial use. See Mont. Code Ann. §§ 85-2-301(1) and 302(1) (1991). The Act states that applications for permits must be accepted and acted upon if they are correct and complete, are in good faith, and represent a *bona fide* intent to appropriate water. Mont. Code Ann. § 85-2-310 (1991). Furthermore, the Department's action must be to grant the permit if the Applicant proves the statutory criteria. 1993 Mont. Laws 370 § 5, and 460 § 1. A single decision in the permitting process on one application cannot stop

future applications from being filed on the same source. Nevertheless, the Water Use Act also provides a mechanism to stop the Department from accepting applications on a source where no unappropriated water is available. That mechanism is a closure, and a closure can be obtained on any source by several different methods. Mont. Code Ann. § 85-2-319 (1991). A closure can be for a specific period of time during each year or it can even prohibit only certain uses of water. See e.g. Mont. Admin. R. Title 36, chapter 12, sub-chapter 10 (1991).

Purely for illustration, consider the following hypothetical example. Assume Reuben Pitsch's present application was dismissed on a ruling that it was barred by collateral estoppel. The Department would still be required to accept, even in the next moment, an application from Reuben Pitsch's next door neighbor for 1200 gallons per minute (gpm) up to 159.09 acre-feet (AF) per year of water from Big Coulee Creek from June 1 through June 30 of each year by means of a pump which could be placed directly across the creek from Reuben Pitsch's pump. It is clear from this hypothetical example that, because the permitting process is not an action between litigants over a claim or demand in controversy, collateral estoppel does not protect prior appropriators from having to object to and argue against the same issues in subsequent actions. Only a closure can preclude that.

Therefore, for the above reasons and pursuant to Mont. Admin. R. 36.12.203(2)(d) (1991), Objectors Van der Voort and Olson's motion to dismiss is hereby

DENIED.

The Department's decisions in Moldenhauer and Fee/Carlson make it clear that an Applicant must show in a second attempt that something must be new and different about the circumstances accompanying the second application. In 53547 by Pitsch the Department concluded the evidence was insufficient to determine whether unappropriated water was available in the proposed source during June. Since that decision was issued, additional materials relating to water availability in the Musselshell River drainage and in the Big Coulee Creek drainage have been developed. They are the materials in Applicant's Exhibits 1 and 2. In addition, permits for appropriations of water from Big Coulee Creek during June of each year, which were valid at that time of 53547 by Pitsch, have since been terminated. These are the different circumstances accompanying this second application which alter the context for considering the issue of availability of unappropriated water in Big Coulee Creek during June of each year.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 80761-s40A in the name of and signed by Reuben Pitsch was filed with the Department on March 20, 1992, at 11:20 a.m.³ (Department's file)

³ N.B.: Materials in the Department's file indicate the application required extensive revision and augmentation beyond what was submitted on the date the original form was filed. The time expended exceeded the time permitted for revisions under Mont. Code Ann. § 85-2-302 (1991). As stated in a copy of a November 6, 1992, letter in the file, the priority date of any

2. Applicant proposes to appropriate 1200 gpm up to 159.09 AF of water per year from Big Coulee Creek by means of a pump in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 5 North, Range 19 East, Golden Valley County, Montana. The appropriation would be used for sprinkler irrigation on 324.20 acres, specifically described as: 38 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$, 118 acres in the SW $\frac{1}{4}$, 65 acres in the SE $\frac{1}{4}$, and 87.5 acres in the NE $\frac{1}{4}$ of Section 35; and 15.7 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ W $\frac{1}{2}$ of Section 36. The period of both appropriation and use would be June 1 through June 30 of each year. (Department's file)

3. Pertinent portions of the application were published in the *Roundup Record-Tribune*, a newspaper of general circulation in the area of the proposed source, on December 23, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. (Department's file)

4. The Department received four timely objections filed against this application. The bases for the objections are contentions that there is no unappropriated water in Big Coulee Creek during June, an additional appropriation in June will cause adverse effects through increased salinity and by depriving prior

permit which may be issued based on this application would not be 11:20 a.m. March 20, 1992, the date of the application form was originally filed. It appears from notes on the Department's "work copy" of the application form, the priority date would be November 19, 1992.

appropriators of their water. No objection was filed by the Montana Department of Health and Environmental Sciences or by a local water quality district. None of the objections filed in this matter contain information establishing that the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will be adversely affected. (Department's file and testimony of Doug Parrott, Harry Van Der Voort, and Dan Olson)

5. All objectors are prior appropriators below the proposed point of diversion. They all have rights to divert water from Big Coulee Creek during the month of June. The uses for which Objectors have water rights include irrigation, stock watering, and municipal. (Department's file, Department's records, and testimony of Reuben Pitsch, Harry Van Der Voort, Dan Olson, Doug Parrott, and Cindy McCaffree)

6. Applicant owns the property which contains the proposed point of diversion and place of use. (Department's file and testimony of Reuben Pitsch)

7. The diversion and conveyance works along with the sprinkler irrigation system have been in place for many years and have functioned properly to irrigate the proposed place of use at the rate of diversion and distribution proposed by the Applicant. The system can be regulated, i.e., it can be shut down during shortages or at the end of the permitted period of use and the amount of water diverted can be known. Objectors stipulated to

the adequacy of the means of diversion, and sprinkler irrigation system. (Department's file and testimony of Reuben Pitsch)

8. The amount of water proposed for use is not greater than the amount estimated to be needed to irrigate alfalfa in the climatic conditions of the proposed place of use. (Department's file)

9. The Department's ultimate conclusion in the Final Order on In re Application 61333-s40A by Reuben C. Pitsch was the evidence in that case record was contradictory as to whether water was available for appropriation in June, therefore the Applicant had not proven the relevant criterion. That Department decision forms no presumption with regard to the question of whether unappropriated water is available in Big Coulee Creek at the proposed point of diversion during the month of June of each year. (53547 by Pitsch, Final Order)

10. In 1985 the Department issued the following Beneficial Water Use Permits for appropriations of water from Big Coulee Creek for irrigation with June included in the period of appropriation:

- i) 027941-s40A to Zinne Brothers
- ii) 027942-s40A to Zinne Brothers
- iii) 050642-s40A to Zinne Brothers
- iv) 027197-s40A to Coulee Hill Ranch, Inc.

All of these permits were subsequently terminated by the Department in January 1989 for failure to complete the permitted projects.

Applicant contends this means previously appropriated water has become unappropriated water which is now available for

appropriation under his application. It is possible, however, the reason the projects were not completed was because of a lack of available water. Records maintained by the Department on these terminated permits do not contain enough information to conclude lack of water was not the reason the permitted projects were not completed. Furthermore, Applicant did not provide evidence relating to the actual reasons for the non-completion of the permitted projects. If lack of water were the reason, these terminations would not be evidence water is available, as Applicant contends, they would be evidence water is not available. (Department's file, Department's records, and testimony of Reuben Pitsch)

11. Sterling Sundheim testified at the November 1985 hearing of the case In re 53547-s40A by Pitsch. His testimony included discussion on water availability. The report, *Water Availability Analysis on the Musselshell River below Ryegate, Montana*, was produced by Sterling Sundheim in January 1982. His testimony in 1985 was based in part on the information in the 1982 report. The conclusion in that case was the whole of the evidence in the record was conflicting as to whether unappropriated water was available in June. Nothing in the record in the present case indicates the treatment of the 1982 report by Sterling Sundheim or the hearing examiner in the 1985 case was incorrect. The 1982 report has no greater weight in and of itself now than it did then. (Applicant's Exhibit 3, 53547 by

Pitsch, Proposal for Decision, and testimony of Sterling Sundheim)

12. No measurements of flows at the proposed point of diversion during the proposed period of use or mathematical estimations for that point and time period are a part of the record or are known to exist.

13. Applicant's eight photographs of water levels in Big Coulee Creek at or in the vicinity of the point of diversion were taken in the months of March, May, and October. All of these months are outside the proposed period of appropriation. (Department's file and Applicant's Exhibit 5)

14. Applicant's pump is located approximately one mile down the stream channel from the confluence of Cottonwood Creek and Big Coulee Creek. The confluence is at stream mile 49. Therefore, the pump, which is at Applicant's proposed point of diversion, can be closely approximated to be at mile 48. The former USGS gauging station on Big Coulee Creek was at stream mile 2.9. Following the course of the channel of Big Coulee Creek, the reliably accurate approximation of the distance from Applicant's point of diversion to the point of the gauging station is 45 miles.

Reliably accurate approximations of distances in river miles from Applicant's pump to USGS stream gauging stations on the Musselshell River are: 86 miles to the station above Roundup, 223 miles to the station at Mosby, and 212 miles to the confluence with Flatwillow Creek which was used by the Department as a data

node in its hydrologic model of the Musselshell River. (River Mile Index, Van Der Voorts' Exhibit 1, and Applicant's Exhibits 2 and 3)

15. The Department has performed hydrologic modelling of flows in the Musselshell River which indicate the total volume of water which flows in the river in June of each year near the confluence of Flatwillow Creek exceeds upstream demand approximately sixty percent of the time. This conclusion, reached in 1990, is qualified by the statement:

"It is important to keep in mind that the model is based on a monthly time period and model results should be viewed as such. It is possible that the model may not accurately represent the occurrence of shortages or surpluses within months when hydrologic conditions change significantly during a month. This might happen, for example, during June when snowmelt runoff and resulting flow in the river are diminishing rapidly. The model could predict an overall surplus for the month of June when, in actuality, a surplus may have occurred in the first part of the month followed by a shortage."

The sixty percent figure was revised in 1992 to eighty percent. This revision would lead one to postulate the likelihood of surplus being followed by shortage within the month of June would diminish accordingly. No retraction or revision of the qualification was made, however. In addition, the data does not address the water available in Big Coulee Creek, which may be more critical than the situation on the Musselshell River. Given this ambiguity in the model, its focus on the mainstem of the Musselshell River, and the distances between the data points and the proposed point of diversion, the reliability and relevancy of the

model results as an indication unappropriated water is available at Applicant's proposed point of diversion during June is limited or "slim". (Applicant's Exhibit 2, *River Mile Index*, 1992 Cawlfeld report, and testimony of Sterling Sundheim)

16. The stream flow analysis performed by Sterling Sundheim on Big Coulee Creek is based on data from the USGS gauging station near Lavina and 1990 flow measurements made by Sterling Sundheim near that location. The analysis concludes that mean monthly flow in Big Coulee Creek at that location in June exceeds 28.2 cfs 20% of the time, 6.9 cfs 50% of the time, 4.3 cfs 60% of the time, 2.7 cfs 70% of the time, and 1.4 cfs 80% of the time. This analysis includes an attempt to account for the contribution of water into Big Coulee Creek by some springs in Section 21, Township 6 North, Range 22 East, which are below the points of diversion of Applicant and Objectors Van Der Voorts and Olsons and above the USGS gauging station. The accounting is based on extrapolations from flow measurements by Sterling Sundheim below the springs in July 1990 when the creek above the springs was dry. Based on these measurements, an estimated spring flow of 1.5 cfs was factored out of the creek flow analysis as a representative value for the spring flow. Sterling Sundheim considers this reliable for comparison purposes even though the USGS stream flow records reveal the flow from the spring fluctuates, sometimes to as low as 0.4 cfs. This stream flow analysis reflects conditions at the USGS gauging station which is many miles downstream from Applicant's point of diversion, and the values in

the analysis are averages for the entire month, are not specific to any part of the month, and do not indicate how many days in the month the projected flow levels may occur. (Applicant's Exhibit 1, Van Der Voorts' Exhibit 1, and testimony of Sterling Sundheim)

17. Applicant is proposing to appropriate a total volume of 159.09 AF which is obtainable only if the full flow rate of 1200 gpm is diverted constantly throughout the thirty days of June. The evidence in the record raises substantial doubt about whether 159.09 AF is ever available at the proposed point of diversion in June. The flow of water in Big Coulee Creek is highly variable. The evidence in the record is consistent in establishing that flows in June are erratic and, at best, start high and diminish rapidly. The finding in 53547 by Pitsch was June flows at the USGS Big Coulee gauging station near Lavina are dependent upon floods from storm events rather than runoff from snow melt, plus return flows from irrigation in April and May conducted by such upstream irrigators as Applicant. Because of the topography and vegetation types in the Big Coulee Creek drainage area, flows from rain diminish quickly. (Department's file, 53547 by Pitsch, Proposal for Decision, and testimony of Reuben Pitsch and Sterling Sundheim)

18. The contributions to Big Coulee Creek mainstem flow from tributaries between Applicant's proposed point of diversion and Objectors' points of diversion are insignificant. Objectors rely on water originating in the headwaters area of the creek to

fill their entitlements. (Testimony of Harry Van Der Voort and Dan Olson)

19. Consistent testimony by Objectors establishes that Big Coulee Creek has a history of chronic water shortages including during the proposed period of appropriation and closer to the point of diversion than the collection point of the data used to calculate estimated amounts of water. In most years the prior appropriators have to cease diverting water for irrigation from Big Coulee Creek in June and only have reliable amounts of water for irrigation from Big Coulee Creek in April and May. Objectors contend an additional upstream appropriation of 1200 gpm of water from Big Coulee Creek in June would cause the creek to be dry at their points of diversion. Objector Olson has a pump with capacity to operate two wheel lines for irrigation from Big Coulee Creek, but only operates one wheel line because there is not enough flow available for two lines. (Testimony of Harry Van Der Voort, and Dan Olson)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1991).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled (see Findings of Fact 1, 2, 3, 4, and 5); therefore, the matter is properly before the Hearing Exam-

er. See Mont. Code Ann. §§ 85-2-301, 302, 305, and 307 through 309 (1991).

3. In accordance with 1993 Mont. Laws 370 and 460, the Department must issue a beneficial water use permit if the applicant proves by a preponderance of evidence that the following criteria set forth in § 85-2-311(1) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(g) the water quality of a prior appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

4. An applicant is required to prove the criteria in subsections (1)(g) through (1)(i) have been met only if a valid objection is filed. A valid objection must contain substantial

credible information establishing to the satisfaction of the department the criteria in subsection (1)(g), (1)(h), or (1)(i), as applicable may not be met. For the criterion set forth in subsection (1)(h), only the Department of Health and Environmental Sciences or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection. No valid objections to this application were filed relative to subsections (1)(h) or (1)(i). See Finding of Fact 4. Therefore, Applicant is not required to prove the criteria in subsections (1)(h) and (1)(i). 1993 Mont. Laws 460 § 1.

5. To meet the preponderance of evidence standard in Mont. Code Ann. § 85-2-311(1), the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, must submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies. 1993 Mont. Laws 370 § 5, and 460 § 1.

6. Applicant has proven they have possessory interest in the place where the water would be put to beneficial use. See Finding of Fact 6. Therefore, the criterion in Mont Code Ann. § 85-2-311(1)(f) has been met.

7. The proposed use of the water, irrigation, is a beneficial use. Mont Code Ann. § 85-2-102(2)(a) (1991). The proposed use of water will benefit Applicant. See Finding of Fact 8. The

amount of water to be appropriated is reasonable for the purpose. See Findings of Fact 2, 9, and 13. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(d) has been met.

8. Applicant proved by substantial credible evidence the proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 2 and 7. Therefore, the criterion in Mont. Code Ann. § 85-2-311(1)(c) has been met.

9. The testimony of Objectors is consistent and raises sufficient doubt about the availability of water in Big Coulee Creek during June to overcome any *prima facie* value of the issuance of prior permits. See Findings of Fact 9, 10, and 19. The evidence provided by Applicant is not substantial enough to overcome the collective and uncontradicted testimony of Objectors. See Findings of Fact 11 through 19. Therefore it cannot be concluded solely on the basis of the results of the hydrologic models that unappropriated water is available at the proposed point of diversion in the amount Applicant is requesting throughout the proposed period of diversion. See In re Application 77304-s40C by Dave and Patricia A. Roberts. There may or may not be water available in Big Coulee Creek in June during a certain identifiable period, and it may occur with sufficient frequency to allow an additional appropriation. The evidence provided by either Applicant or Objectors in this case and by either Applicant or Objectors in the previous case, In re Application 53547-s40A by Pitsch, lacks enough substance and precision to conclude

there is a preponderance supporting a conclusion in either direction, i.e., that unappropriated water is available or is not available in Big Coulee Creek during June at the proposed point of diversion.

In light of evidence of chronic water shortages in Big Coulee Creek during June, and without substantial credible evidence showing with specificity that water is reasonably available in the amount requested at the proposed point of diversion during the proposed period of use, it is concluded that the criterion in Mont. Code Ann. § 85-2-311(1)(a) is not met.

10. Since Applicant is required to prove all the criteria necessary for the issuance of a permit have been met, and since Applicant has failed to prove the amount of water Applicant seeks to appropriate is reasonably available in the source of supply at the proposed point of diversion during the proposed period of appropriation, no finding is necessary as to whether the water rights of prior appropriators would be adversely affected, whether the water quality of a prior appropriator will be adversely affected, or whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See In re Application 53221-s400 by John E. and Betty J. Carney; In re Application 61333-s40A by Reuben C. Pitsch; In re Application 77335-s40A by Reuben C. Pitsch.

PROPOSED ORDER


Application for Beneficial Water Use Permit 80761-s40A by Reuben C. Pitsch is denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exceptions and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 15th day of July, 1993.



John E. Stults, Hearing Examiner
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and Conservation
1520 East 6th Avenue
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties

of record at their address or addresses this 16th day of July,
1993, as follows:

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